

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

VIRGINIA CALL, Administratrix for
the Estate of Dwight E. Call, Deceased,
and VIRGINIA CALL, Individually,

Plaintiffs,

v.

Case No. 3:07-CV-188
Judge Robert Chambers

AMERICAN INTERNATIONAL GROUP, INC., a/k/a
AMERICAN INTERNATIONAL COMPANIES;
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA; and
AIG DOMESTIC CLAIMS, INC., d/b/a
AIG CLAIMS SERVICES, INC.

Defendants.

PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF ANGELA HERDMAN

NOW COMES the plaintiff, Virginia Call, individually and as Administratrix of the Estate of Dwight E. Call, deceased, by counsel, Mundy & Nelson, and respectfully moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to strike the Affidavit of Angela Herdman, provided by the defendants, as the Affidavit does not comply with the Federal Rules of Civil Procedure. In support of this Motion, the plaintiff states as follows.

1. The plaintiff filed this civil action alleging breach of contract as well as violations of the West Virginia Unfair Claims Settlement Practices Act for the handling and denial of the plaintiff's claim for insurance benefits pursuant to an accidental death and disability policy. See, Complaint, filed herein.

2. On April 14, 2008, the plaintiff filed a Motion for Partial Summary Judgment with respect to the breach of contract claim. See, Plaintiff's Motion for Partial Summary Judgment, filed herein.

3. On April 28, 2008, the defendant responded to the Motion for Partial Summary Judgment. See, Defendants', American International Group, Inc., National Union Fire Insurance Company of Pittsburgh, Pa, and AIG Domestic Claims, Inc. Response and Opposition to Plaintiff's Motion for Partial Summary Judgment, filed herein.

4. Attached to the defendants' Response to the Motion for Partial Summary Judgment was an Affidavit executed by defense counsel, Angela D. Herdman, on behalf of the defendants. See, Affidavit of Angela D. Herdman, attached to Defendants' Response to Motion as Exhibit G.

5. In the Affidavit, Ms. Herdman outlines a conversation she allegedly had with Glen Hanchey, the only individual to witness the death of the plaintiff's decedent, Dwight Call. Id.

6. The plaintiff now requests that this Court strike Ms. Herdman's Affidavit as it does not comply with the Federal Rules of Civil Procedure.

7. Rule 56 of the Federal Rules of Civil Procedure states that "Supporting and opposing affidavits should be made on personal knowledge, shall set forth such facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. Pro. 56(e).

8. The Fourth Circuit Court of Appeals has found that it is entirely proper for a district court to determine what portions of an affidavit are based upon personal knowledge and strike portions thereof that are not based upon personal knowledge. Evans v. Technology Applications and Services Co., 80 F.3d 954, 962 (4th Cir. Md. 1996).

9. As affidavits submitted on summary judgment must contain admissible evidence and must be based upon personal knowledge, the affidavits cannot be conclusary or be based upon hearsay. Id. (internal citations omitted).

10. Obviously, the entire paragraph four (4) of Ms. Herdman's Affidavit, whereby she outlines the facts as allegedly related to her by Mr. Glen Hanchey, amount to hearsay and, are therefore, not admissible.

WHEREFORE, the plaintiff, Virginia Call, individually and as Administratrix of the Estate of Dwight E. Call, respectfully requests that this Court strike the Affidavit of Angela Herdman, and for such further relief that this Court deems appropriate.

VIRGINIA CALL, INDIVIDUALLY
AND AS ADMINISTRATRIX FOR
THE ESTATE OF DWIGHT
CALL, DECEASED,

BY COUNSEL

s/James A. Spenia

West Virginia State Bar # 9487

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Defendants.

CERTIFICATE OF SERVICE

I, James A. Spenia, attorney for the plaintiff, hereby certify that a true copy of
PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF ANGELA HERDMAN has been
electronically served upon the following counsel of record, this 6th day of May, 2008, via the
CM/ECF System.

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s/ James A. Spenia

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